Supreme Court, U.S.
FILED
SEP 22 2000
CLERK

(2)

No. 00-306

In The

Supreme Court of the United States

LINDA DENNO, as parent, legal guardian and next friend for WAYNE DENNO,

Petitioners,

v.

SCHOOL BOARD OF VOLUSIA COUNTY, DENNIS ROBERTS, an individual, and ROBERT WALLACE, an individual,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRUCE A. HANNA
Counsel of Record
C. ALLEN WATTS
COBB COLE & BELL
Post Office Box 2491
150 Magnolia Avenue
Daytona Beach, FL 32115-2491
(904) 255-8171
Attorneys for Respondents School Board of Volusia County, Dennis Roberts and Robert Wallace

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

20 pp

PARTIES TO THE PROCEEDING

Petitioner is Linda Denno as parent, legal guardian and next friend for her son, Wayne Denno. Petitioner was plaintiff in the United States District Court for the Middle District of Florida and appellant before the United States Court of Appeals for the Eleventh Circuit.

Respondents are the Volusia County School Board, a public school board organized under the constitution of the State of Florida, Dennis Roberts, dividually and as an employee of the School Board of Volusia County, Florida, and Robert Wallace, individually and as an employee of the School Board of Volusia County, Florida. Respondents were defendants and appellees below.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

ARGUMENT 4

I.

NEITHER THE DISTRICT COURT NOR THE APPELLATE COURT REJECTED OR IGNORED *TINKER* .. 4

II.

THE APPELLATE COURT DID NOT HOLD THAT *TINKER* HAS BEEN ERODED BY *FRASER* 9

III.

DENNO NEVER ASKED ANY COURT TO DETERMINE THE EXISTENCE OF THE SUBSTANTIVE RIGHT OF A STUDENT TO DISPLAY A CONFEDERATE FLAG BEFORE DETERMINING THE ISSUE OF QUALIFIED IMMUNITY 11

IV.

TO OVERCOME A MOTION FOR SUMMARY JUDGMENT, THE NON-MOVANT MUST COME FORWARD WITH SOME EVIDENCE TO SHOW A GENUINE DISPUTE OF A MATERIAL FACT 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) ..... *passim*

Celotex v. Catrett, 477 U.S. 317 (1986) 1, 15

City of St. Louis v. Prapotnik, 485 U.S. 112 (1988) 13

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 11

Denno v. School Board of Volusia County, Florida, 218 F.3d 1267 (11th Cir. 2000) ..... *passim*

Monell v. Department of Social Services of the City of New York, 436 U.S. 658 (1978) 13

Muller by Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996) 7, 8

Pembaur v. City of Cincinnati, 475 U.S. 469 (1986) 13

Santamorena v. Georgia Military College, 147 F.3d 1337 (11th Cir. 1998) 5, 12

Scala v. City of Winter Park, 116 F.3d 1396 (11th Cir. 1997) 14

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969) ..... *passim*

West v. Derby Unified School Dist. No. 260, 23 F. Supp.2d 1223 (D. Kan. 1998) 7, 8

Wilson v. Layne, 526 U.S. 603 (1999) 12

STATUTES

42 U.S.C. §1983 ..... 4, 13

STATEMENT OF THE CASE

Two discrete procedural events resulted in the disposition of this case in the district court. The case against respondents, Dennis Roberts (Roberts) and Robert Wallace (Wallace), was dismissed by order of the district court and that dismissal was affirmed by the appellate court. Denno's action against respondent, Volusia County School Board (VCSB), concluded with the district court's entry of summary judgment in favor of VCSB. That judgment was affirmed by the appellate court.

In his Statement of the Case, Denno asserts that, "[s]ince this case was decided by the district court on motions to dismiss and for summary judgment, the facts as set forth in the pleadings are deemed true . . . ." Petition, at 4. While Denno's statement is accurate with respect to that portion of the case decided on motion to dismiss, it is inaccurate with respect to that portion of the case concluded by the entry of summary judgment.[1]

Denno's "Statement of the Case" sets forth a mixture of facts including: (1) facts as alleged in his complaint; (2) facts supported by record evidence; (3) undisputed facts; and (4) disputed facts which were neither alleged in the complaint nor supported by record evidence. Although Denno appeals both an order of dismissal and summary judgment, he fails to distinguish between the four categories of facts appearing in his Statement of the Case.

---

[1] Rule 56(e) "requires the non-moving party to go beyond the pleadings and by [his or her] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

Where necessary, respondents will distinguish between allegations, facts adduced during discovery, undisputed facts, and disputed facts which were neither pled nor supported by record evidence. Although he has previously argued the existence of certain facts, Denno neither pled nor supported with record evidence the following facts set forth at page 7 of his petition:

> After returning to school, Denno sought to expunge the suspension. Petitioners met with Principal Rowe who declined the request without explanation. Through counsel, Petitioners immediately contacted the School Board's General Counsel to request further review by the Assistant Superintendent. They were ignored. When Petitioners' counsel then contacted the Assistant Superintendent directly, he was informed that no formal review would be undertaken on the grounds that Petitioners had waited too long.

Petition, at 7.

Notwithstanding Denno's suggestion that his attempt to secure review of his suspension was allegedly frustrated by respondents, no record evidence supported such contentions and both the district court and the appellate court found that Denno simply failed to timely seek review of his suspension. (C-13-14); (A-20-21).

REASONS FOR DENYING THE WRIT

In his attempt to articulate some issue warranting review by this Court, Denno poses four questions arising out of the two discrete conclusions of the district and

appellate courts. Both courts found that: (1) the doctrine of qualified immunity protected the individual defendants from personal liability to Denno; and (2) the school board was not liable to Denno because the prohibition against his display of a Confederate flag was not the result of a formal policy, custom or practice, or decision by an official with final policymaking authority.

As to the individual defendants, Denno attempts to capture this Court's attention by asserting that the Eleventh Circuit Court of Appeals ignored or rejected this Court's decision in *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). The opinion of the appellate court does not support Denno's argument. Throughout its opinion, the appellate court repeatedly acknowledged *Tinker* as one of two Supreme Court cases which "dominates the legal landscape" in the area of student speech.

Denno's assertion that "the cornerstone of the appellate majority's opinion . . . is the belief that *Fraser* has eroded the holding in *Tinker*" is likewise without merit. The appellate court reached no such conclusion but instead found that, in determining whether Denno had a clearly established right to display a Confederate flag, both *Tinker* and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), were applicable and that the individual defendants were to be charged with the knowledge of both cases.

Denno further complains that, in determining whether he had a clearly established right to display a Confederate flag, the appellate court failed to first determine the existence of such a right. Denno never requested

that either the district or appellate court decide the substantive constitutional right to display a Confederate flag prior to addressing the issue of qualified immunity. Having, until now, failed to ask any court to do so, Denno cannot be heard to complain that the lower courts failed to determine the substantive constitutional right.

As to respondent VCSB, Denno argues that this Court must review the Eleventh Circuit's decision in order to prevent governmental entities from improperly insulating themselves against liability under 42 U.S.C. §1983. Summary judgment was entered in favor of VCSB because Denno was unable to adduce any record evidence to create a genuine issue as to whether the prohibition of the display of a Confederate flag was the result of a formal policy, custom or practice, or decision by an official with final policymaking authority. Accordingly, the only issue presented with respect to the school board is whether, in response to a motion for summary judgment, the nonmovant who will bear the burden of proof at trial must designate some fact which creates a genuine issue for trial. This court has previously answered this question in the affirmative and there is no compelling reason to revisit this issue.

ARGUMENT

I.

NEITHER THE DISTRICT COURT NOR THE APPELLATE COURT REJECTED OR IGNORED *TINKER*.

Denno argues that a constitutional right which is clearly established by this Court cannot thereafter be

rendered unclear by "after-the-fact, non-binding decisions of lower courts." Petition, at 9. This question is not raised by the decisions of the lower courts because neither the district court nor the appellate court found that any non-binding decision of a lower court rendered this Court's decisions unclear.

The district and appellate court determined that Roberts and Wallace were protected against personal liability to Denno based on the doctrine of qualified immunity. In reaching its decision, the appellate court observed that "[q]ualified immunity shields government official from both suit and liability if their conduct violates no clearly established right of which a reasonable person would have known." *Denno v. School Board of Volusia County, Florida*, 218 F.3d 1267, 1269-70 (11th Cir. 2000) (A-2), citing *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1339-40 (11th Cir. 1998). Consequently, the appellate court undertook the task of determining whether pre-existing law clearly established Denno's right to display a Confederate flag at school. *Denno* at 1271 (A-5).

In order to determine whether Denno had a clearly established right to display a Confederate flag at school, the appellate court properly "examined the legal landscape at the time of the individual defendants' actions" and observed that the landscape in the area of student speech was dominated by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). *Denno* at 1271 (A-5-6).

In *Tinker*, this Court held that a student has a First Amendment right to display a black armband at school, notwithstanding the school officials' fear that display of the symbol would create a disturbance, so long as there was no more than an "undifferentiated fear or apprehension of a disturbance." *Denno* at 1271 (A-6) citing *Tinker* at 508.

In *Fraser*, after stating that one of the purposes of public education is to inculcate the habits and manners of civility as values conducive both to happiness and to the practice of self-government, this Court stated:

> These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of the others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

Denno at 1271 (A-6-7) citing *Fraser* at 681.

The appellate court acknowledged that these two cases dominate the legal landscape in the area of student speech and determined that a reasonable governmental official is charged with the knowledge of both cases. *Denno* at 1272 (A-9). The appellate court determined that "[to] the extent a reasonable school official viewed the relevant legal landscape as including the more flexible

Fraser standard, the official would look not merely to the reasonable risk of disruption standard (the *Tinker* standard), but would also balance the freedom of Denno and the similarly situated students to advocate unpopular and controversial views against the school's interest in teaching students the boundaries of socially appropriate behavior." *Denno* at 1275 (A-16). Accordingly, the court could not conclude that the actions of the individual defendants in this case violated clearly established First Amendment rights. *Denno* at 1275 (A-17-18).

Denno asserts that the appellate court improperly held that "a reasonable school official might conclude that *Tinker* is no longer 'clearly established' law due to subsequent decisions of non-binding courts." Petition, at 10. Denno further asserts that, in reaching that holding, the appellate court improperly relied on the decisions of the Seventh Circuit Court of Appeals in *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996) and a Kansas district court in *West v. Derby Unified School Dist. No. 260*, 23 F. Supp.2d 1223 (D. Kan. 1998), *aff'd*, 206 F.3d 1358 (10th Cir. 2000) (petition for *certiorari* pending) to conclude that it would not be unreasonable for a school official to prohibit Denno from displaying his Confederate flag. Petition, at 10. Denno argues that the appellate court was without authority to look to "persuasive opinions when the law of the Supreme Court and circuit resolve the issue." Petition, at 10. Denno specifically asserts that, as a result of its reliance on the non-binding, after-the-fact, dicta, the appellate court found *Tinker* to be no longer clearly established (Petition, at 10) and implies that, based on its review of the persuasive authority, the

appellate court found *Tinker* to be "archaic," and "non-binding." Petition, at 12.

Denno's argument is without merit. Rather than finding *Tinker* to be "no longer clearly established", "archaic," and "non-binding" as Denno suggests, the appellate court expressly stated that *Tinker* is one of two Supreme Court cases that "dominate the legal landscape" in the area of student speech. *Denno* at 1276 (A-5-6) and that a reasonable official would be charged with the knowledge of both cases. *Denno* at 1272 (A-9). The appellate court did not find that the doctrine of qualified immunity protected the individual defendants from personal liability because *Muller* and *West* nullified *Tinker*. The appellate court found the individual defendants qualifiedly immune because a reasonable school official charged with the knowledge of both *Tinker* and *Fraser* "may have been led to the view that the legal landscape permitted application of the more flexible *Fraser* standard where the speech involved intrudes upon the function of the school to inculcate manners and habits of civility." *Denno* at 1274 (A-14). Although Denno argues that the appellate court reached its decision by ignoring *Tinker*, it is clear from the opinion that the court reached its decision by considering both *Tinker* and *Fraser*.

To the extent the appellate court relied on *Muller* and *West*, it did not do so to support a conclusion that *Tinker* is "archaic" but, instead, to note that other jurists addressing similar facts and issues included a consideration of *Fraser* in their analysis. After analyzing *Muller* and *West*, the appellate court did not determine that *Tinker* was now inapplicable but rather that "we cannot conclude that . . . the *Tinker* standard should apply in the

instant case to the exclusion of the *Fraser* standard." *Denno* at 1274 (A-13). Although Denno insists the appellate court ignored *Tinker*, it is clear beyond reasonable dispute that it did not do so. The appellate court simply refused to ignore *Fraser*.

II.

THE APPELLATE COURT DID NOT HOLD THAT *TINKER* HAS BEEN ERODED BY *FRASER*

Denno argues that the appellate court found this Court's opinion in *Fraser* eroded the clarity of *Tinker*. Like the first question presented, Denno creates a straw argument to attack. In finding that the individual defendants were protected by qualified immunity, the appellate court did not find that *Tinker* has been eroded by *Fraser* as suggested by Denno. Although Denno states that "[t]he cornerstone of the appellate majority's opinion on rehearing is the belief that *Fraser* has eroded the holding in *Tinker*" (Petition, at 13), he does not cite to the appellate opinion to support his proposition. The reason for the lack of citation to the appellate opinion is that the appellate court did not conclude that the holding of *Tinker* has been eroded. Indeed, the appellate court repeatedly referred to the "*Tinker-Fraser*" legal landscape and recognized that the "legal landscape" regarding student speech is "dominated by" both *Tinker* and *Fraser*. *Denno* at 1271 (A-5-6). Rather than rejecting *Tinker*, the appellate court acknowledged *Fraser* and observed that "[t]o the extent that a reasonable school official viewed the relevant legal landscape as including the more flexible *Fraser* standard, the official would look not merely to the reasonable risk

of disruption (the *Tinker* standard), but would also balance the freedom of Denno and the similarly situated students to advocate unpopular and controversial views against the School's interest in teaching students the boundaries of socially appropriate behavior." *Denno* at 1275 (A-16). Although Denno argues that the appellate court applied *Fraser* rather than *Tinker*, the court clearly and repeatedly stated that both cases appeared in the legal landscape and that, in determining whether an individual violated clearly established law, the official would be charged with the knowledge of both *Tinker* and *Fraser*. *Denno* at 1272 (A-9).

Denno refers to the "staggering implications" on student speech in the event the appellate court's opinion is allowed to stand. Petition, at 16. Denno describes a parade of horribles in which, absent review by this Court, public school students may, without recourse, be deprived of all symbolic speech. Denno's suggestion that the appellate opinion will result in students being left without recourse against improper restraints on student speech is without merit. The appellate opinion did not address a student's right to display a Confederate flag or any other symbol on school grounds during school hours. The appellate court was asked to address the issue of whether that right, if it exists, is so clearly established that a governmental official can be held personally liable to a student for prohibiting its display. It did not find that students may be prohibited from displaying Confederate flags or any other symbol. The appellate court merely found that Denno's right to display a Confederate flag on school property during school hours was not so clearly established that the individual assistant principals could

be held personally liable to Denno for prohibiting him from displaying that symbol.

III.

DENNO NEVER ASKED ANY COURT TO DETERMINE THE EXISTENCE OF THE SUBSTANTIVE RIGHT OF A STUDENT TO DISPLAY A CONFEDERATE FLAG BEFORE DETERMINING THE ISSUE OF QUALIFIED IMMUNITY

Denno complains that the appellate majority "refused to explicitly determine whether Denno or any other public high school student has the constitutional right to the nondisruptive display of a Confederate battle flag." Petition, at 16. The appellate court did not "refuse" to determine the existence of such a substantive right. Neither party asked the court to make that determination. *Denno* at 1275 n.5 (A-14). Now for the first time, Denno complains that it should have done so. By failing to request that the appellate court determine the existence of the substantive right before proceeding to the issue of qualified immunity, Denno should be estopped from raising it now.

Furthermore, it is not clear that this Court requires, without exception, that the existence of the constitutional right be determined before addressing the issue of whether that right is clearly established in the context of qualified immunity. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court stated that the "better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all" and that "[n]ormally, it is only then that a court

should ask whether the right allegedly implicated was clearly established." *Lewis*, 523 U.S. at 840-842 n.5. The Eleventh Circuit has not interpreted this Court's statement to mean that it is without discretion to analyze a particular qualified immunity case without first deciding whether the constitutional right exists. *Santamorena v. Georgia Military College*, 147 F.3d 1337, 1343 (11th Cir. 1998). Indeed, in this case, the appellate court acknowledged that, generally, the better approach in determining qualified immunity is to first determine the existence of the substantive right. *Denno* at 1275 n.5 (A-14). However, the Court expressly concluded that this case constituted an exception to the usual analysis and that neither party argued that the Court must proceed otherwise. *Id.*

Denno argues that a court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right before determining whether that right was clearly established at the time of the alleged violation. Petition, at 16, citing *Wilson v. Layne*, 526 U.S. 603, 609 (1999). However, even though the lower court in *Wilson* "declined to decide whether the actions of the police violated the Fourth Amendment," *Wilson*, 526 U.S. at 608, this Court did not find that the lower court committed reversible error by proceeding directly to the issue of qualified immunity. Similarly, even in the event this Court determines that the appellate court should have addressed the substantive constitutional right before proceeding with its analysis of qualified immunity, the court's failure to do so does not warrant review.

IV.

TO OVERCOME A MOTION FOR SUMMARY JUDGMENT, THE NON-MOVANT MUST COME FORWARD WITH SOME EVIDENCE TO SHOW A GENUINE DISPUTE OF A MATERIAL FACT

Denno asks this Court to review the summary judgment in favor of VCSB entered by the district court and affirmed by the Eleventh Circuit Court of Appeals on the issue of VCSB's liability. Denno argues that review of this issue is necessary to prevent school boards from improperly insulating themselves from liability under §1983 simply by delegating all controversial decisions to individual schools subject solely to some non-functional omnibus grievance procedure. Petition, at 21.

The issue, as framed by Denno, is not present in this case. The issue with respect to the liability of VCSB is whether the opponent of a motion for summary judgment who bears the burden of proof at trial must come forward with some evidence to show a genuine dispute of a material fact. In this case, Denno simply failed to do so.

A government cannot be held liable under §1983 on a theory of respondeat superior. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691 (1978). In order to hold a governmental entity liable pursuant to §1983, a plaintiff must establish any one of the following: (1) a formal policy authorizing the prohibited act; (2) a custom or practice of engaging in the prohibited act; or (3) a decision by a person with final policymaking authority to engage in the wrongful act. See *Monell* at 690-691, and *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). Drawing on this Court's opinion in *City of St.*

Louis v. Praporinik, 485 U.S. 112 (1988) (plurality opinion), the Eleventh Circuit has squarely held that "[f]inal policymaking authority over a particular subject area does not vest in an official whose decisions in the area are subject to meaningful review." *Scala v. City of Winter Park*, 116 F.3d 1396, 1404 (11th Cir. 1997).

Denno concedes that VCSB had no formal policy prohibiting the display of Confederate flags by students. Petition, at 19. Denno failed to introduce any record evidence to support his argument that VCSB had a prior custom or practice of prohibiting students from displaying the Confederate flag. *Denno* at 1277-78 (A-22-23). In fact, as noted by the appellate court, Denno himself admitted in his deposition that, until the incident giving rise to this lawsuit, Denno had never been prohibited from displaying a Confederate flag nor had he ever heard of any public school student being prohibited from or disciplined in response to displaying such a flag. *Denno* at 1277-78 (A-14-15).

Both the district and appellate courts found that the individuals who allegedly made the decision to prohibit Denno from displaying the Confederate flag did not possess final policymaking authority in the area of student speech because their decisions were subject to meaningful review. *Denno* at 1277 (A-21).

Both the district and appellate courts found that the Code of Student Conduct and Discipline provided a procedure for a meaningful review of the individual official's decision regarding student speech. *Denno* at 1277 (A-21). The undisputed evidence established that Denno simply failed to timely avail himself of the procedure utilized by

VCSB to review the decisions of its employees. *Denno* at 1277 (A-20-21). Accordingly, summary judgment was appropriate.

Now, for the first time, Denno claims VCSB historically does not review the decisions of its school principals with respect to the rights of student speech. Petition, at 20. Similarly, Denno now suggests that VCSB does not follow its grievance procedure. Petition at 20-21. These assertions are without record support. If such evidence exists, the appropriate time to have referenced it was in response to VCSB's motion for summary judgment in the district court not in a petition for writ of certiorari to the United States Supreme Court.

Denno asserts that this case requires this Court to clarify that "meaningful review" must be more than a "catch-all" grievance procedure (particularly one which is not followed by the governmental body). In fact, this case does not present an issue nearly that attractive. The question presented in this case is whether in response to VCSB's motion for summary judgment Denno was required to come forward with some evidence to raise a genuine dispute as to whether Policy 208 failed to provide an opportunity for meaningful review of the administrators' decision. That a non-movant is required to do more than rest on his pleadings and by his own affidavits or depositions, answers to interrogatories, and admissions on file designate specific facts showing that there is a genuine issue for trial was clearly established in *Celotex v. Catrett*, 477 U.S. 317, 324 (1986). Although Denno now argues that VCSB ignored his request for review, historically avoided review of its principals, and did not follow

its review procedure, Denno failed to support these arguments in the district court with any affidavit, deposition, answer to interrogatory, or admission on file. The undisputed evidence was that Denno failed to timely avail himself of the review procedure. Accordingly, summary judgment was appropriately entered against Denno and in favor of VCSB. There is no compelling reason for this Court to revisit the issue of whether a non-movant who bears the burden of proof at trial must come forward with some evidence to raise a genuine dispute in response to a proper motion for summary judgment.

CONCLUSION

For the reasons set forth above, Denno's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRUCE A. HANNA
Counsel of Record
C. ALLEN WATTS
COBB COLE & BELL
Post Office Box 2491
150 Magnolia Avenue
Daytona Beach, FL 32115-2491
(904) 255-8171

Attorneys for Respondents
School Board of Volusia County,
Dennis Roberts and Robert Wallace